IN THE

Supreme Court of the United States

October Term, 1977
No. 77-388

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,
Appellants,

v.

CONFEDERATED BANDS AND TRIBES OF THE YAKIMA INDIAN NATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF

of

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; SUQUAMISH TRIBE OF INDIANS; MUCKLESHOOT INDIAN TRIBE; QUINAULT INDIAN NATION; SWINOMISH INDIAN TRIBAL COMMUNITY; THE TULALIP TRIBES OF WASHINGTON; PORT GAMBLE BAND OF KLALLAM INDIANS; PUYALLUP TRIBE OF INDIANS; QUILEUTE INDIAN TRIBE; SHOALWATER BAY INDIAN TRIBE; SQUAXIN ISLAND INDIAN TRIBE; SKOKOMISH INDIAN TRIBE; LUMMI INDIAN TRIBE; MAKAH INDIAN TRIBE; NOOKSACK INDIAN TRIBE; SPOKANE INDIAN TRIBE; KALISPELL INDIAN COMMUNITY; NISQUALLY INDIAN COMMUNITY; and HOH INDIAN TRIBE

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SUBJECT INDEX

TABLES OF AUTHORITY

Table of Cases

Statutes

Other Authority

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INTEREST OF AMICI CURIAE

Amici represent all of the federally recognized Indian tribal governments (excepting respondent Yakima Indian Nation) whose reservations are located within the boundaries of the State of Washington and over whom the state purports to exercise some form of jurisdiction pursuant to Public Law 83-280. Amici have sought and received per-

mission to file this brief from all parties and letters of consent are on file with the Clerk.

The amici tribal governments wish to indicate by the filing of this brief that they are unanimous in their opposition to the unlawful assertions of jurisdiction over them by the State of Washington and that they are now performing or are capable of performing all functions necessary to replace all of the limited services the State of Washington is performing for them pursuant to P.L. 83-280. Since the assertions of state jurisdiction in 1957, all tribes have suffered under a state regime which provides little service but uses P.L. 83-280 to frustrate and destroy the legitimate efforts of the tribal governments to assist the people and maintain their culture.

This Court has noted the destructive impact of P.L. 83-280 on tribal governments. *Bryan v. Itasca County,* 426 U.S. 373 (1976), note 14 at 388. In a recent case the federal district court for Oregon developed many of the reasons for the movement away from the jurisdictional scheme developed under P.L. 83-280. *United States v. Hoodie,* 441 F. Supp. 835 (D.C. Ore., 1977).

Reports on P.L. 83-280 in this state by the Governor's Indian Advisory Council (1971); the National American Indian Court Judges Association (1973); and the American Friends Service Committee (1978); have all concluded that assertions of state jurisdiction are destroying the Indian tribes and the Indian family. The State of Washington asserts in its Brief (p. 37) that pursuant to P.L. 83-280, it will determine the degree of tribal self-government to be allowed. It is clear to the amici tribes that they will not survive state control.

The problems of checkerboard jurisdiction, so recently disapproved by this Court in *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463 (1976), have been compounded by the pattern of state, federal, and tribal jurisdiction asserted over the reservations by Washington. For these reasons, amici support the position of the Yakima Nation.

QUESTION PRESENTED

Did the State of Washington, by failing to amend its constitution prior to asserting Indian jurisdiction, violate the statutory requirements of Public Law 83-280?

SUMMARY OF ARGUMENT

I. Section 6 of Public Law 83-280 requires that the State of Washington amend its constitution prior to asserting jurisdiction over Indian country.

II. The decisions of this Court require that the statutory provisions of P.L. 83-280 be strictly construed against the state and tribal governments.

III. The legislative history of P.L. 83-280 shows the intent of Congress regarding the amendment of state constitutions.

IV. The United States maintained jurisdiction in Indian country exclusive of the states until Congress provided a method for asserting state jurisdiction.

V. The amendment of state constitutions was required by federal enabling acts allowing conditional entry into the Union.

VI. The legislative history shows that Congress intended to require Washington to amend its constitution pursuant to section 6 before asserting Indian jurisdiction.

VII. State jurisdiction on Washington reservations was conditioned on constitutional amendment.

VIII. The concept of federalism requires that Washington's constitution be amended prior to asserting Indian jurisdiction.

IX. The proviso in section 6 requires an amendment to Washington's constitution.

X. The necessity of amending Washington's constitution is a federal, and not a state, question.

XI. The rule in the *Quinault* case is inconsistent with the strict construction analysis developed by this Court and should be overturned.

XII. The rule in the *Tonasket* case in inconsistent with the strict construction analysis developed by this Court and should be overturned.

I.

Argument

In 1953, the Congress of the United States enacted Public Law 83-280 (67 Stat. 588) providing a method by which certain states might take some jurisdiction over Indian people and property. Section 2 of that Act turned over jurisdiction to certain named states. Section 6 provided a method by which states entering the Union under federal-state compacts preventing these states from taking Indian jurisdiction could obtain that jurisdiction which was offered under P.L. 83-280. These prohibitions against Indian jurisdiction were usually contained in reciprocal federal enabling act and state constitutional provisions. Section 7 provided a method by which states which did not enter the

Union with a specific impediment to Indian jurisdiction could obtain the jurisdiction they lacked.

The imposition of State Public Law 83-280 jurisdiction on the Indian people has resulted in a good deal of appellate litigation over the issue of whether or not the states, other than those specifically named in Section 2 of the Act, have acted properly to obtain the jurisdiction offered them by Congress under P.L. 83-280. In general, only this Court (in *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423 [1971]; *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 [1973]; and *Bryan v. Itasca County*, 426 U.S. 373 [1976]) has ruled in favor of the Indian tribes' objections to the manner in which states have used Public Law 83-280 to force their laws upon the unwilling reservation peoples.

In the State of Washington, the tribes have always objected to the manner in which the State of Washington attempted to assert P.L. 83-280 jurisdiction over the reservations within state boundaries. In short, Washington acted by passing legislation, (Revised Code of Washington, Chapter 37.12), purporting to take the jurisdiction offered. The tribal governments have always contended that Washington is governed by Section 6 of P.L. 83-280 and must amend its constitution in order to exercise Indian jurisdiction.[1] It is the belief of the tribes that the legislative method, having been

1. The Ninth Circuit Court of Appeals agreed that Washington was a Section 6 state in *Quinault v. Gallagher*, 368 F.2d 648 (1966). The Washington Supreme Court on the other hand, has taken varying positions on whether Section 6 or 7 applies to Washington. In *State v. Paul*, 53 Wn.2d 337 P.2d 33 (1959), the state court mentioned but did not really rely on Section 6 or 7 and decided that the action of the state legislature in enacting RCW 37.12 had the effect of "supplementing Congressional enactment of P.L. 83-280." In *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 356 P.2d 985 (1960), Section 7 was

required by Section 7 of P.L. 83-280 which governs only that class of states without a federal-state compact preventing Indian jurisdiction, does not affect Washington.

Section 6 of Public Law 83-280 provides:

> Section 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their state constitution or statutes as the case may be.

The Enabling Act for the State of Washington required the State to disclaim jurisdiction over reservation Indians. 25 Stat. 676. The State did so in Article 26 of its Constitution. Although that Article has never been amended or repealed, the State of Washington has proceeded to assert jurisdiction pursuant to various state legislative enactments. See Chapter 240, Laws of 1957 and Chapter 36, Laws of 1963, codified as RCW 37.12.

It would seem clear that this assertion of jurisdiction without amendment of the state constitution is invalid as in conflict with the requirements of Section 6, Public Law 83-280.

However, neither the state courts, nor the Ninth Circuit

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relied on and found applicable. In *Makah v. State*, 76 Wn.2d 490, 457 P.2d 590 (1969), the court held that the state was entitled to select between sections. In *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744 (1974), the court by their interpretation of the "where necessary" phrase in Section 6 apparently decided that Section 6 was proper. In *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217 (1974), the state court held that the "legislative method" was correct, requiring an assumption that Section 7 was again being relied upon.

Court of Appeals have required the state to assume jurisdiction by constitutional amendment. Accordingly, this analysis will assemble the arguments for the proposition that a constitutional amendment is necessary and then take a close look at the state and federal cases to decipher their reasoning and discuss how they fit within the requirements of P.L. 83-280.

II.

This Court Has Required A Strict Construction of The Provisions of Public Law 83-280

Three decisions of this Court have dealt with the provisions of P.L. 83-280. In *Kennerly, supra*, this Court held that by the enactment of P.L. 83-280 Congress has preempted the field in the area of transfer of jurisdiction over Indian tribes from the tribal and federal governments to the states and that the provisions of P.L. 83-280 would be strictly construed against both the states and tribes in dealing with jurisdictional matters.

Thus, even the action of the Blackfeet Tribal Council in turning jurisdiction over to the State of Montana, was held void when it was shown that none of the requirements of P.L. 83-280 had been complied with. This Court said:

> With regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country, there was, at the time of the Tribal Council resolution, a "governing Act of Congress," i.e., the Act of 1953. Section 7 of the statute conditioned the assumption of state jurisdiction on "affirmative legislative action", by the state; the Act made no provision whatsoever for tribal consent, either as a necessary or sufficient condition to the assumption of state jurisdiction. *Nor was the requirement of affirmative legislative action an idle choice of words;* the legislative history of the 1953 statute shows

> that the requirement was intended to assure that state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities. See H.R. Rep. No. 848, 83rd Congress, 1st Session 6, 7 (1953); *Williams, supra, at 220-221. [Williams vs. Lee,* 358 U.S. 217 (1959)]. Our conclusion as to the intended governing force of § 7 and the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain states to Indian country.* See n. 1, *supra.*
>
> In *Williams,* the Court went on to note the absence of affirmative congressional action, or affirmative legislative action by the people of Arizona within the meaning of the 1953 Act. 358 U.S., at 222-223. Here it is conceded that Montana took no affirmative action with respect to the Blackfeet Reservation. The unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction over Indian country under the 1953 Act, *supra,* at p. 427.

(Emphasis supplied).

It can be argued that, because Washington has the same Enabling Act language and the same constitutional impediment to Indian jurisdiction as does Montana, this Courts' reliance on Section 7 instead to Section 6 in its decision is recognition that Section 7 may be used by states like Washington and Montana to obtain Indian jurisdiction. Three factors militate against this conclusion.

First, Montana had neither passed legislation nor amended its constitution. Thus, this Court was not presented with the issue of whether one section or the other applied to Montana. Second, none of the briefs presented by the parties in *Kennerly* raise any issue but Section 7. Thus, this Court, noting that Montana had done nothing that might

qualify as an act of asserting jurisdiction did not have to look behind the statements of counsel as to which section applied.

Finally, in *McClanahan, supra,* this Court cleared up the matter by indicating that states like Arizona, which also shares the same Enabling Act and constitutional impediment language with Montana and Washington, would have to amend its constitution in order for it to obtain Indian jurisdiction. In *McClanahan,* the Court said:

> Finally, it should be noted that Congress has now provided a method whereby states may assume jurisdiction over reservation Indians. Title 25 U.S.C. § 1322 (a) grants the consent of the United States to states wishing to assume criminal and civil jurisdiction over reservation Indians. But the Act expressly provides that the state must act "with the consent of the tribe occupying the particular Indian country," 25 U.S.C. § 1322(a), and must "appropriately amend [its] constitution or statutes." 25 U.S.C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the states were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly vs. District Court,* 400 U.S. 423 (1971).
>
> Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected.

Kennerly and *McClanahan* together provide the legal basis for making a decision regarding the necessity of amendment in order to obtain jurisdiction. The principle of strict and narrow construction of P.L. 83-280 established in those cases was carried forward in *Bryan, supra.*

III.

The Legislative History of P.L. 83-280 Shows That Washington Was Required to Amend Its Constitution Prior to Assume Indian Jurisdiction

In its decision on rehearing in *Quinault Tribe v. Gallagher*, 368 F.2d 648 at 656 (9th Cir. 1966), that Court construed the legislative history of P.L. 83-280 (found at 1953 U.S. Code Cong. and Admin. News, pp. 2412-2414) to allow the state of Washington to take jurisdiction by legislative rather than constitutional amendment. Unfortunately, very little of the legislative history relating to the adoption of that Act was available to the Ninth Circuit in 1966. In addition to the published hearing report, *supra*, the House Committee on Interior and Insular Affairs (Subcommittee on Indian Affairs), held other hearings attached as appendices to the brief of Respondent Yakima Indian Nation. This Court used that legislative history extensively in its decision in *Bryan*. See note 9 at 383.

Simply stated, Public Law 83-280 means what Congress intended it to mean. *See*: *e.g.*: *Jones v. Guaranty & Indemnity Co.*, 101 U.S. 622 (1879); *The People v. Utica Ins. Co.*, 15 Johns (N.Y.) 357; *United States v. Babbit*, 1 Black 55, 101 U.S. ...., at 626; *United States v. Cooper Corp.*, 312 U.S. 600 (1941) at 606; *United States v. American Trucking Ass'n., Inc.*, 310 U.S. 534 (1940); *Brooks v. Mobile School Board*, 31 Ala. 227; *United States v. Landram*, 118 U.S. 81 at 85 (1886); *Singer v. United States*, 323 U.S. 338 (1945); *Supreme Investment Co. v. United States*, 468 F. 2d 370, 381 (5th Cir. 1972); *United States v. CIO*, 335 U.S. 106 (1948); *Harrison v. Northern Trust*, 317 U.S. 476 (1943); *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Galvan v. Press*, 347 U.S. 522 (1954); *Schwegmann Bros. v. Calvert Distillers Corp.*, 431 U.S. 384 at 394-5 (1951).

IV.

Indian Jurisdiction Under the Enabling Acts

Keeping applicable rules of statutory construction in mind, it is necessary to examine the legislative history of Public Law 83-280. The law was not enacted in a vacuum, but was one of many pieces of Indian legislation considered by the 83rd Congress. An examination of Senate Report No. 699 which accompanied H.R. 1063, reveals that in the midst of termination bills and other measures in five district areas of legislation, Public Law 83-280 as passed, was narrowly tailored to meet two legislative purposes. The statute was to extend state criminal laws to Indian country and to make provision for state courts to adjudicate civil controversies affecting Indians arising in Indian country.

The original bill, introduced by Congressman Norris Poulson of California, was drafted for California alone. But the Department of the Interior recommended that it be recast as a prototype bill allowing all states to assume Indian jurisdiction upon compliance with its provisions. The attempt led head-on into a snarl of constitutional complexity. The difficulty lay in the decisions of this Court and congressional acts in response to those decisions prohibiting state jurisdiction in Indian country.

Beginning with *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), this Court held that until Indian title to Indian country was extinguished, (1) Indian country remained separate and apart from states and state laws could not be applied extraterritorily inside the reservations, and, (2) attempts to assert state jurisdiction over Indian country invaded the exclusive power of the United States to regu-

late Indian commerce. In the Indian Trade and Intercourse Act, 4 Stat. 729, Congress defined "Indian country" as land to which Indian title had not been extinguished, including Indian lands within states and outside states.

In the *Kansas Indians,* 72 U.S. (5 Wall.) 737 (1886), this Court affirmed *Worcester,* and in a companion case, the *New York Indians,* 72 U.S. (5 Wall.) 761 (1886), the Court extended the doctrine to the thirteen original states. The significance of the *New York Indians* is that this Court's prohibition of state jurisdiction on Indian reservations is shown to be independent of state enabling acts.[2] Thus, reliance on what is or is not in the precise words of state enabling acts is dangerous when dealing with jurisdiction on reservations.

In 1888, the date of congressional debate of the enabling act for Washington, Montana, and the Dakotas; state Indian jurisdiction was prohibited (1) by the Supreme Court until Indian title was extinguished and (2) by Congress under its exclusive power to regulate the affairs of reservation Indians.

The key to understanding Congress' intent in the Washington enabling act and later in Public Law 83-280 is recognizing that the "consent of the United States" to assumption of Indian jurisdiction contemplated in the enabling act was predicated upon a previous extinguishment of Indian title which the General Allotment Act of 1887 was specifically designed to effect. In *Draper v. United States,* 164 U.S. 240, 246 (1896), this Court recognized § 6 of the

2. Congress would not have had to enact Section 7 of P.L. 83-280 permitting states without enabling act prohibitions to take Indian jurisdiction if the only bar to Indian jurisdiction were the enabling act.

General Allotment Act as contemplating ". . . the gradual extinction of Indian Reservations and Indian titles."

The allotment system was, however, dismantled in the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, and successive federal statutes have continued the trust status of tribal and allotted Indian lands. Indian title has not been extinguished, and the boundaries of reservations have been defined in a federal statute, 18 U.S.C. § 1151. *See*: *DeCoteau v. District Court,* 420 U.S. 425 (1975) footnote 2.

V.

The Class of Constitutional Impediment States

Another problem, of equal significance, is that the ordinance called for in § 4 of the enabling act was, by the terms of the act, incorporated into the constitutions of Washington, Montana, and the Dakotas, and similar ones were incorporated into the constitutions of Arizona, New Mexico, Oklahoma and Utah. But since the consent of "the people of said states", was made a federal requirement to state assumption of Indian jurisdiction under the various enabling acts, and since each state constitution could only be changed through its amendatory procedure, the 83rd Congress was aware that amendments to those eight state constitutions were necessitated by the federal enabling acts and the state constitutions. They were also quite aware of the necessities of maintaining a federal system of government and the requirements of the state-federal relationship.

The difficulty which confronted Congress in 1953, then, lay in part in its desires to consent to state assumption of Indian jurisdiction without extinguishment of Indian title or destroying reservation boundaries, and in part in the

necessity under federal law of amendment of state constitutions for eight of the 26 states under consideration. The constitutional maze through which Congress had to thread its way required that for the constitutional impediment states the United States give an altered consent crafted to achieve Congress' aim through provision for amendment of state constitutions and the unusual device of simultaneous but conditional amendment of the federal enabling acts.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped P.L. 83-280 is available to illumine for this Court the step by step evolution of the act. See: Unpublished reports of the hearing on H.R. 1063 before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 1st Sess. *Bryan, supra,* note 9.

VI.

The Legislative History

The evolution of §§ 6 and 7 of Public Law 83-280 can best be ascertained from the informed Congressional discussion in the Committee hearing. Mr. Abbott, counsel to the Committee, first stated:

> The bill does not, as acted upon by the committee make provision for eight states which have constitutional organic impediments for accepting state jurisdiction. The enabling acts for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and Washington provided that exclusive federal jurisdiction would be retained.
>
> The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction. . .
>
> I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they would remove those impediments by action of the people in the state, they could then take over the exclusive criminal and civil jurisdiction over Indians and Indian matters.
>
> In addition, Mr. Westland's state [Washington], which is one state which has a constitutional impediment, the one section provides for removal by the state of constitutional impediments. The other section would apply to any other of the 15 Indian states, so that they by affirmative action could assume either criminal or civil jurisdiction or both, at such time as the matter were laid before the legislative bodies.
>
> In short, the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply first to the eight states having constitutional or organic law impediments and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.
>
> The other amendment would apply to any other Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

Committee Hearing on H.R. 1063, p. 2, l. 22,—p. 3, l. 7; p. 3, l. 16 to p. 4, l. 4.

It can be seen that in order to allow the bill to operate nationwide, the legal analysts who developed the bill recognized that amendments would have to be made to provide for differing legal problems in two distinct classes of states.

The two amendments with sharply contrasting language must be studied carefully.

Section 6. Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their State Constitution or statutes as the case may be.

Section 7. The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of actions, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the state to assumption thereof.

Public Law 83-280, 67 Stat. 588 at 590.

Mr. Abbott's bald statement that § 6 and not § 7 governs Washington, makes Congress' intent very clear. But the matter doesn't end there. The conclusion is bolstered in the Senate and House Committee Reports on H.R. 1063, which read in part:

Your Committee has amended the printed bill by adopted substituted language which operates to—

(2) give consent of the United States to those states presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.

Examination of the federal statutes and state constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those states contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these states in the absence of consent being given for future action to assume jurisdiction is to retain exclusive federal jurisdiction until Indian title in such lands is extinguished; such states could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedures.

S. Rep. 699, 83rd Cong., 1st Sess., H. Rep. 848, 83rd Cong., 1st Sess.

The matter is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

MR. CASE: . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which *make it possible for states which by their compact* with the United States or, in some cases their constitution, ceded *jurisdiction with respect to Indian lands to the United States, to amend their constitutions* so as to come under to provisions of the bill. I have in mind, of course, particularly, the situation in South Dakota and *Washington* under the identical enabling act. I understand that the same situation obtains in Montana, North Dakota, and possibly Wyoming.

MR. BARRETT: Mr. President, the Senator from South Dakota is correct.

(Emphasis supplied.) 99 Cong. Rec. 19782 (August 1, 1953).

Congress' intent in P.L. 83-280 is detailed (1) by the sponsors of the Act, (2) in Congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. All agreed unanimously that § 6 and not § 7 governed Washington. The Bureau of the Budget in it's recommendation to President Eisenhower concurred.

VII.

The Meaning of Section 6

Section 6 begins: "Notwithstanding the provisions of any Enabling Act for the admission of a state . . ." and then grants federal consent to amendment of the constitution.

The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

> MR. BERRY: Mr. Chairman, I would like to ask a question. Would it be better to word that to say that this "shall be applicable" instead of saying "consent is hereby granted." Why not say, "the provisions of the law shall be applicable", to these states wherein they do these things.
>
> MR. WESTLAND: I believe the law would then be applicable to them, once they had taken this affirmative action.
>
> MR. RHOADES: Will the gentlement yield. You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.
>
> MR. DAWSON: That brings up another question: Whether your wording should refer to the Enabling Act. You say, "We hereby give our consent for them to amend their state constitution." Their state constitution was based on the Enabling Act. In other words they followed that. I wonder whether we should have something in there to say, "Notwithstanding any restrictions in the Enabling Act, consent is hereby givent to amend their state constitution."
>
> MR. ABBOTT: [Counsel] I think that would help clarify the intent of the committee at the present time and of Congress if they favorably acted on the legislation.

Committee Hearing on H.R. 1063, p. 8, l. 20 to p. 9, l. 22.

When Congress did act favorably on the legislation its intent to amend the Enabling Act for the limited purpose of allowing constitutional amendment became law. But it must be firmly kept in mind that the Enabling Act amendment was only conditional and only became operative by virtue of state constitutional amendment. The provision to § 6 underscores this conclusion. ". . . Provided, that until the provisions of this Act shall not become effective . . . until . . ." 67 Stat. 588 at 590.

Bluntly put, since Washington did not amend its constitution, its Enabling Act was not amended by Public Law 83-280 and it could not validly assume Indian jurisdiction.

VIII.

Why A State Constitutional Amendment Was Required By Congress—The Concept of Federalism

Congressmen debating P.L. 83-280 were concerned not only with the effect of the bill on the jurisdiction of the states and the United States in Indian Country, they were concerned with the structure of the compact between the states and the United States as represented by the federal enabling act and the State constitutional impediment which implemented that federal act. In other words, they were concerned with the consistency and integrity of the federal constitutional system.

> MR. BERRY: Mr. Chairman, then we get right back to your objection. Congress does not have to give consent to a state to amend its constitution or its laws.
>
> MR. DAWSON: Because when the Enabling Act was passed, they said this state can become a state upon certain conditions except for the Enabling Act.
>
> In other words, we restrict what they can put in their

> laws and constitution to begin with. The state cannot go any further than their government lets them go when they become a state, so we are now lifting one of those restrictions.
>
> With respect to the state of Utah, for instance, the federal government said, the state of Utah shall not pass any laws giving them jurisdiction over Indians, or to try Indians for offenses. That was part of the Enabling Act on which our constitution was based. Therefore, we have no right to change our statutes without the consent of the government.
>
> It is in the Enabling Act in all of these five states. That is the reason for my suggestion that you might well refer to the Enabling Act and say, "Notwithstanding any provisions of the Enabling Act consent is hereby given to amend the constitution."
>
> Mr. Abbott: [Counsel] It is in the constitution as a direct result of being in the Enabling Act. In the government Enabling Act the federal government retained the jurisdiction and the states in their constitutions had a prohibition against any legislation which would assume jurisdiction.

Committee Hearing on H.R. 1063, p. 9, l. 23, to p. 10, l. 25.

Here Congress was expounding not on Indian jurisdiction, but on the basic law of the federal system with regard to organic relations between the states and the federal government. The concern was not only that Congress withdrew the prohibitions in the Enabling Act in a proper manner within the federal system, but that the states also withdrew their agreements to that prohibition in a proper manner under the federal law.

The question of whether state law requires constitutional amendment was never at issue here. The question is specifically one of federal law and the legal requirements of operating under a federal system.

IX.

Consent To Amendment of State Constitution

After the initial amendatory language § 6 continues:

> the consent of the United States is hereby given to the people of any state to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this Act. . .

67 Stat. 588 at 590.

Thus, § 6 gives federal consent to state assumption of Indian jurisdiction and again the proviso conditions that consent upon amendment of the consttitution. That this twofold conclusion is Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

> Mr. Berry: Does not make this bill applicable to all states who do amend their laws under the constitution, and it greatly increases the authority of the bill.
>
> Mr. Abbott: [Counsel] The intention was to grant it to all states at such time as they were willing to allow take it. The five states we have named have been consulted with by the Indian Bureau. *Any other time in the future that the State of Washington or South Dakota is able to remove their constitutional impediments,* then they could so do it . . . (Emphasis added.)
>
> Mr. Westland: *I believe the State of Washington* was consulted on this matter and they indicated their readiness to take over this jurisdiction as far as criminal and civil was concerned, but they *do have a constitution there that requires this amendment,* (referring to § 6) in order that they can get at it.

(Emphasis added.)

Committee Hearing on H.R. 1063, p. 7, ll. 14-25; p. 8, ll. 1-9.

Later the Committee began consideration of § 7 which provides Indian jurisdiction for any of the class of states with Indian populations which entered the union without enabling act prohibitions and constitutional impediments. ". . . at such time and in such manner as the people of the state shall by affirmative legislative action, obligate and bind the state to the assumption thereof." 67 Stat. 588 at 590.

The contrast between the language of § 6 authorizing "the people of any state to amend . . . their state constitution" and that of § 7 providing that "the people of the state shall, by affirmative legislative action" points up quite forcefully Congress' plain intent that the triggering event in § 7 be a statute enacted by the legislature. The point was driven home once and for all in the Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order for the Bureau of Indian Affairs, presented the final version of the act.

> MR. ABBOTT: [Counsel to Committee] Mr. Benge informs me there are 26 states shown there as having Indian populations. You can correct it for the record, Mr. Benge, but I believe several of those states have constitutional prohibitions against jurisdiction.
>
> MR. BENGE: Yes, sir; that is right.
>
> MR. ABBOTT: Which would mean that there would be apparently no jurisdiction.
>
> MR. BENGE: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the Union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. To meet that the state legislature would have to amend the constitution.
>
> I take that a general Bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.
>
> MR. ASPINALL: *The State Legislature would not do it. The people of the state themselves would have to do it.*
>
> MR. BENGE: Yes, sir.

(Emphasis supplied.) Subcommittee Hearing on H.R. 1063, p. 23, l. 8, to p. 24, l. 5.

Nothing could demonstrate more effectively Congress' intent that § 6 authorizes Washington to assume Indian jurisdiction not by legislative action but only conditionally upon amendment of the constitution.

However, one difficulty remains: § 6 of Public Law 83-280 authorizes amendment of the constitution "or existing statutes . . .". Does that not mean that simple legislative action without constitutional amendment is alternatively authorized by § 6 for Washington? Are § 6 and § 7 interchangeable in some cases?

Such an interpretation will not do. First, it would make § 6 and § 7 equivalent, and therefore, § 7 totally redundant in blatant violation of the maxim of avoiding redundancies; *United States v. Landrum,* 188 U.S. 31, 30 L. Ed. 58, 6 S. Ct. 954 (1886). Finally, and providentially, the very problem occurred to Congressman Wesley A. D'Ewart of Montana during committee deliberations.

> MR. WESTLAND: This amendment would insert two new sections. First, is Section 6, which says: "The consent of the United States is hereby given to the

people of any state to amend where necessary their state constitutions or existing statutes . . ."

MR. D'EWART: I do not think we have to grant permission to a state to amend its own statutes.

MR. ABBOTT: [Counsel] Mr. D'Ewart, I believe the reason for that is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act [the Enabling Act], and it may be unnecessary, but by some state courts, it may be interpreted as being necessarry.

Committee Hearing on H.R. 1063, p. 6, ll. 18-22, p. 7, ll. 5-11.

The grant of permission to amend statutes in § 6, then, is an extra measure of consent to states with disclaimers of Indian jurisdiction in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be in addition to constitutional amendment and is decidedly not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma, North Dakota, and South Dakota. The extra measure of consent to amend statutes in § 6 is limited to those three states.

X.

Whether Washington Has Validly Assumed Indian Jurisdiction Is A Federal Question

The transfer of jurisdiction over an Indian tribe and its reservation between the United States and one of the states of the Union, is a transfer which involves the rights and powers of three sovereignties; the United States, the State, and the Tribe. The matter at issue here is in the nature of the compact or agreement between sovereigns, *United States v. Brown,* 339 F. Supp. 536 (D.C. Neb. 1971). In cases in which the interpretation of such an

agreement has been at issue, the courts of the United States have always looked to federal law.

In the case of *Dyer v. Sims,* 341 U.S. 22 (1951), the Court not only held that an interstate compact should be interpreted according to federal law; it went on to interpret a state constitution, already interpreted by the state courts on the issue, under federal law. In *Lesser v. Garnet,* 258 U.S. 130 (1922), the Court applied federal law to the ratification by the state legislatures of Tennessee and West Virginia of the Nineteenth Amendment to the United States Constitution.

The meaning of an interstate compact is a matter of federal law. *Dyer v. Sims, supra; Petty v. Tennessee-Missouri Bridge Co.,* 359 U.S. 275 (1959); *Nebraska v. Iowa,* 406 U.S. 117 (1972). Federal law and construction also applies to compacts between states and the United States. *James v. Dravo Contracting Co.,* 302 U.S. 134 (1937).

The question of whether as a matter of state law the constitution of the State of Washington must be amended or not pursuant to P.L. 83-280 does not have to be reached. It is clear under the federal enabling act that the constitutional impediment required thereby was contemplated by the federal government to prevent the state from taking jurisdiction over Indians on their reservations.

Required state action under § 6 to trigger conditional amendment of the federal enabling act and effect Congress' consent to state assumption of Indian jurisdiction is a federal function deriving from the federal constitution. *Lesser v. Garnet, supra.* Only federal interpretation of the effectiveness of the triggering event is controlling. *Lesser v. Garner, supra.*

Here, the federal interpretation of Congress that the triggering event be a state constitutional amendment is not only decisive, but is guaranteed by the proviso in § 6. A State Supreme Court may not so interpret the state constitution as to avoid a federal rule. *Dyer v. Sims, supra.*

In two recent cases involving the same event, the retrocession of state jurisdiction over the Omaha reservation to the federal government by the legislature of Nebraska, both Courts held that federal law should be used to consider the effect of the retrocession by that legislature. *United States v. Brown,* 334 F. Supp. 536 (D. Neb. 1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 337 F. Supp. 823 (D. Neb. 1971).

In the *Brown* and *Omaha Tribe* cases, the courts held that federal law governed because the scheme for the accomplishment of retrocession is a federal one and that even though the resolution of the Nebraska legislature granting retrocession was invalid under state law, the federal law scheme was satisfied by the presumedly valid resolution.

Congress has the power to require states to amend their constitutions even though such an amendment might not have been necessary under state law. *See*: *McClanahan, supra,* at 165, 178-169, 170-172, 175-177. Questions regarding jurisdiction over reservation Indians are federal questions. This Court is not bound by a state court interpretation of the Washington Enabling Act or of P.L. 83-280. *See Kennerly, supra.* Any ambiguity in a federal statute dealing with Indian people is to be interpreted so as to benefit the interest of Indians. *Bryan, supra; Squire v. Capoeman,* 351 U.S. 1, 6-9 (1956); *United States v. Santa Fe R.R.,* 314 U.S. 339, 353-354 (1941); *Choate v. Trapp,* 244 U.S. 665 (1912), *Cherokee Intermarriage*

Cases, 203 U.S. 76, 94 (1906). In interpreting Article 26 of the Washington Constitution, this Court is not bound by state court rulings and must guard against state rulings which undermine federal laws and programs. *See*: *First Agriculture National Bank of Berkshire Co. v. State Tax Commission,* 392 U.S. 339, 347-348 (1968); *Kem-Limerick Inc. v. Scurlock,* 347 U.S. 110, 121 (1954); *Mason Co. v. Tax Commission,* 302 U.S. 186, 206-207 (1937); *Carpenter v. Shaw,* 280 U.S. 363, 367-368 (1930); *Ward v. Love,* 253 U.S. 17, 22-23; *United States v. Little Misere Land Co.,* 412 U.S. 580, 596-607, 603 (1973); *Testa v. Katt,* 330 U.S. 386, 392-393 (1947).

ANALYSIS OF THE QUINAULT DECISION

Quinault v. Gallagher, supra, remains the basis for holdings by state and federal courts that Washington's assumption of Indian jurisdiction was lawful. The *Quinault* Court read the incomplete legislative history of P.L. 83-280 to show that, while Congress may have assumed that the state constitutional disclaimer could be removed by only constitutional amendment, the "underlying concern", of Congress was that the impediment be removed in a manner that would be valid and binding under state law. 368 F.2d at 656. For several reasons this conclusion should now be reconsidered.

First, as stated above, this Court in *Kennerly, supra,* and *McClanahan, supra,* has held that the desires of Congress in this matter must be strictly construed against the states and tribes. Congress by its instructions in P.L. 83-280 has preempted the field of transfer of jurisdiction. While the actions of Montana and Arizona in applying their laws to Indians were certainly valid and binding on

those states, this Court did not find that the satisfaction of any "underlying concern" permitted those states to continue to enforce their laws. On the contrary, this Court found that the state disclaimers had to be removed in a particular way satisfying federal law—a finding squarely opposed to the finding in the *Quinault* court.

As has been shown above, the legislative history shows absolutely and conclusively that Congress commanded the states who fell within Section 6 of P.L. 83-280, (the *Quinault* court seems to agree that Section 6 covers Washington) to amend their constitutions as a prerequisite to taking Indian jurisdiction. As is pointed out by the Congressmen many times, the problem to be solved is one of permitting states to assume jurisdiction under federal law and within the structure of the federal system.

Thus, the acts of the state, simply because they are binding on the state, do not provide full compliance with the act of Congress. It is this final point which the *Quinault* court confuses with the need for a full understanding of the provisions of the enabling act and P.L. 83-280. While the *Quinault* court seems to agree that the federal enabling act and P.L. 83-280 should be interpreted as federal and not state law, the court gives as its reason for deciding that the word "people" in the enabling act did not require a vote of the people the following:

> As we stated above, all that concerned Congress was that the consent of the people be evidenced in some manner valid and binding under state law."

368 F.2d at 657.

In the face of the legislative history and the *Kennerly* and *McClanahan* decisions, this reason is not sufficient.

ANALYSIS OF THE TONASKET DECISION

The last word of the Washington Supreme Court on the question of the validity of State jurisdiction under P.L. 83-280 is contained in *Tonasket v. State of Washington*, 84 Wn.2d 164, 525 P.2d 744 (1974). As was noted in the footnote above, the Washington court has not clearly indicated whether they believe Washington to be under section 6 or 7. This brief will assume, because section 6 is discussed by the *Tonasket* court, that it believes section 6 applies.

The question of whether section 6 or 7 applies is not uppermost in the minds of the *Tonasket* court. Initially they find, 525 P.2d at 752, that the federal enabling act can be narrowly construed (In violation of their holding that enabling acts should be broadly construed, *Boeing v. Reconstruction Finance Co.*, 25 Wn.2d 652, 171 P.2d 838 (1946), to allow the state to take jurisdiction over Indian reservations even without P.L. 83-280. It is curious to note that the analysis of the Washington court in this area is almost word for word and case for case the same as that of the Arizona Court of Appeals in *McClanahan v. Arizona State Tax Commission*, 14 Ariz. App. 452, 484 P.2d 221 (1971), *rev'd, McClanahan, supra.* The enabling act theory of the Arizona court was specifically disapproved by this Court in *McClanahan, supra.* as violating two centuries of history, federal policy, and law dealing with jurisdiction over Indian people and reservations.

The "proprietary versus governmental" distinction relied on by the *Tonasket* court is also disapproved in *McClanahan,* and is no bar to federal overriding of countervailing state interests where the federal government is acting within a delegated power, such as, the power to regulate commerce among the Indians. *Maryland v. Wirtz,* 392 U.S. 183 (1968).

If this holding of the *Tonasket* court is correct, there would have been no reason for Congress to have enacted section 7 of P.L. 280 governing states without enabling act impediments, and indeed, as the *Tonasket* dissent relates; would reduce the whole of P.L. 83-280 to "mere surplusage."

By the use of their enabling act argument, the *Tonasket* court attempts to avoid dealing with P.L. 83-280. When they reach a discussion of the statute, they conclude only that the "where necessary" clause of section 6 gave the state the right to decide whether a constitutional amendment is necessary or not. This argument is not supported

by the legislative history and is not supported by characterizations of P.L. 83-280 in *Kennerly* and *McClanahan* as a "statutory imperative" to be strictly construed by the courts.

Respectfully submitted,

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